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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 936

STEPTOE AND JOHNSON, ET AL.,
Petitioners,

v.

FORT MYERS SEAFOOD PACKERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case on June 21, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 1b, is reported in —— U. S. App. D. C. ——, 381 F.2d 261. The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, p. 1a, is reported in 253 F. Supp. 626.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1967. Rehearing *en banc* was denied on September 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the Court of Appeals for the District of Columbia, in the face of controlling local and Supreme Court decisions, allow a suit for legal malpractice to be maintained subsequent to the running of the statute of limitations?
2. Does each new element of damage resulting from the same tort extend the three year statute of limitation—contrary to the congressional intent as expressed in the word "accrues"—to the date of its occurrence?

STATUTE INVOLVED

D. C. Code § 12-301 (1967 ed.):

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

* * * * *

(8) for which a limitation is not otherwise specially prescribed—3 years.

STATEMENT OF THE CASE

On July 22, 1965 respondent, Fort Myers Seafood Packers, Inc., a Florida corporation of which J. Carl Abbott was president and principal owner, filed a complaint against the Washington, D. C. law firm of Steptoe and Johnson and I. Martin Leavitt, one of the partners, "For Damages Based on False and Fraudulent Warran-

ties, Negligence and Improper Legal Advice" arising in 1962 out of a contemplated fishing boat venture in Venezuelan waters.

Petitioners, on a retainer basis, were Washington attorneys for a New York seafood importer of which a Mr. Bent Mogelberg was vice president. Mogelberg had been in direct contact with respondent's president about a plan whereby a small fleet of shrimp boats controlled by respondent would be taken from Florida to Venezuelan waters, to catch shrimp which would be first frozen by a Venezuelan company, then distributed by the New York importer.

In preliminary conferences to which petitioners were not privy, both a director of the Venezuelan company and the New York importer allegedly assured respondent's president that it would be legally unnecessary for him to change the American registry of the boats to Venezuelan in order to fish there (J.A. 92a, 115a, 116a, 148a).[1]

In May, 1962, the New York importer sent petitioners a marked copy of a contract, which had previously been used in a similar venture in Colombia, along with a list of typewritten changes "which would apply in the contract between boat owners and Frioven-Zulia, S. A. in Venezuela". One of the attached list of changes was to be:

> "Neither the laws of Venezuela nor the provisions of this contract require or contemplate any change in the present American Registry of the vessel, except for such temporary registration permit which will be granted the vessel for its operations in Venezuelan waters for the duration of this Agreement. Such temporary permit shall not affect American registry of the vessel and if at any time a permanent change in Registry is required, this contract shall terminate immediately." (J.A. 30a)

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[1] References are to the Joint Appendix, filed in this Court as a part of the record below.

Pursuant to his client's instructions petitioner Leavitt incorporated the following in the draft of a proposed contract between respondent and the Venezuelan processor:

> "Neither the laws of Venezuela nor the provisions of this Contract requires or contemplates any change in the present American registry of the boat(s)."

The New York client did not ask petitioners what the Venezuelan law was with respect to the provision for change in the American registry of the vessel (J.A. 183a), nor to check on what that law was (J.A. 220a). The attorney had no knowledge one way or the other on the subject (J.A. 177a) and at no time was instructed to investigate the matter. Pursuant to his New York client's instructions (J.A. 201a, 206a, 207a, 221a), petitioner Leavitt conformed the draft to the earlier contract and on May 16, 1962 forwarded to respondent a draft of the proposed contract with a covering letter stating that it contained the language of the Colombian contract except for changes to identify the Venezuelan company "and to incorporate the various changes set forth on a list sent to me by Mr. Mogelberg" and cautioning (J.A. 19a):

> "I suggest you read very closely the enclosed contract, and if any changes need be made, make them prior to execution."

Petitioner Leavitt at no time represented to respondent that he was an expert on, or had looked up, Venezuelan law. (J.A. 39a). In fact respondent's president deposed that when he received the draft contract sent May 16, and before he made an investigatory trip to Venezuela, he would have said "forget it" [the venture] if he had known that a change of flag would be required under Venezuelan law:

> "My response to that was that I would never move out of the United States if I had to change the flag. 'Unless you make arrangements to us—or your com-

pany makes arrangements to furnish me with work visas, fishing licenses, navigational permits, and allow me to work under the United States flag, forget it.'" (J.A. 115a).

On May 24, 1962 (J.A. 103a, 106a, Abbott Dep. 57) respondent's president left Florida for an investigation trip to Venezuela which lasted for seven days (Abbott Dep. 57, 58). He took with him a fishing gear expert, some of whose expenses were borne by respondent (Abbott Dep. 43). The inspection trip expenses were to come out of respondent's profits from this operation if and when he decided to take the fleet of boats to Venezuela (Abbott Dep. 97). Following the return of his inspection party to the United States, respondent decided to enter into the venture (J.A. 106a).

At the request of their New York client, petitioners between June 16, 1962 and July 17, 1962 successfully processed the applications of respondent for United States Maritime Administration approval for time charters of the American vessels to the Venezuelan company (J.A. 107a, 109a). Had the parties in their initial negotiations decided on a sale rather than a charter, approval of the application would have been granted just as quickly, but would have required the filing of a different set of forms with the Commission.

Before dispatching the nine vessels from Florida for Venezuela on July 18, 1962, for what was contemplated would be a two-year stay, respondent equipped them with "extra equipment" he would not have had to carry if the fishing were in Texas waters where spare parts would have been accessible (Abbott Dep. 258), this being:

> "Equipment necessary to keep the boats shrimp fishing, extra webbing, extra cables, extra batteries, extra propeller shafts, extra propellers, quantities of engine parts, all of my machine tools."

Respondent knew from his May 1962 trip of investigation that he had to get a crew list together, list the equipment aboard the vessels, radios, radio license numbers, radio wattage output, all of the extra cargo listed as ships' equipment, the tonnage of the vessel and the registered length and mail them to Venezuela for use in obtaining work visas, fishing licenses and navigational licenses (Abbott Dep. 166). This significant activity was carried out about two weeks before leaving the United States.

Upon their arrival in Venezuela July 25, 1962, the boats were temporarily impounded, according to respondent for illegally entering Venezuelan waters under American registry (J.A. 127a, 128a). The respondent-owned vessels were later released and sailed for the United States before mid-August, 1962 (J.A. 134a).

In response to a request *from their New York* client (J.A. 210a), petitioners ascertained informally from United States officials that it would be permissible to sell the boats temporarily to a Venezuelan company and later retransfer them to American registry. This information was transmitted by appellees *to its New York client* by letter of August 15, 1962 (J.A. 83a, 133a), not "to appellant" as the Court of Appeals' opinion erroneously states. See Appendix B, *infra*, p. 2b.

On July 22, 1965, three years and 67 days after the draft of the proposed contract had been sent by petitioners to respondent, this action was filed against them. [A separate lawsuit was instituted against the New York importer.]

Petitioners pleaded the statute of limitations and, after depositions of respondent's president and of petitioner Leavitt, moved for summary judgment. The motion was granted by the District Court upon the ground that the cause of action accrued on May 16, 1962, the date petitioners sent respondent the contract containing the al-

legedly erroneous statement of law, rather than on July 25, 1962, the date respondent's American-registered boats were temporarily impounded upon their arrival in Venezuelan waters.

The Court of Appeals, however, reversed the District Court. It rejected the holding of the District Court and decisions of this Court that limitations began to run at the time the allegedly erroneous advice was given and held that "the suit was timely *whether or not appellees' advice had previously caused other damage.*" (Emphasis added.)

REASONS FOR GRANTING THE WRIT

1. The decision below is so clearly in conflict with applicable local decisions as to warrant exercise of this Court's ultimate judicial responsibility over the District of Columbia.

Prior to the date the decision in the instant case was rendered, the law with respect to the running of the statute of limitations in the District of Columbia was always construed in a manner consistent with the statutory intent:

> "The statute of limitations is 'three years from the time when the right to maintain such action shall have accrued.'" *Finegan* v. *Lumbermens Mutual Casualty Company*, 117 U. S. App. D. C., 276, 278, 329 F.2d 231, 233 (1963), citing D. C. Code, § 12-201 (1961 ed.) and *Wilcox* v. *Plummer*, 29 U.S. 172 (1830), a decision of this Court presenting the exact question decided in the instant case (see point two, *infra*).

In *Hanna* v. *Fletcher*, 97 U. S. App. D. C. 310, 231 F.2d 469, cert. den., 351 U. S. 989 (1956), the Court of Appeals for the District of Columbia was presented with the question of when an action "accrues" under District

law. It succinctly stated that an action in tort accrues at the time "injury result[s] from the alleged negligence." In the instant case, however, the Court of Appeals felt no compulsion to follow this clear guideline but rather established a new statute of limitations for the District of Columbia which in effect reads:

> "An action may be brought three years from the time the maximum damage complained of occurred."

The Court of Appeals found that respondent suffered damage on July 25, 1962, some two months after the alleged erroneous advice was given. But, it said it would "not now consider whether it might have been found the appellees' advice had caused damage before the boats were impounded, or whether recovery might have been had for such earlier damage." Appendix B, *infra*, p. 3b. In so doing the court glossed over the crucial issue which prompted the District Court to grant the motion for summary judgment: that respondent suffered damage as of May 16, 1962 and as of *that date* was entitled to bring an action against the petitioners. The Court of Appeals' startling formulation means that no matter when the original wrong took place, and no matter on what date the plaintiff was entitled to sue, limitations ran from the time the particular damage for which relief was sought occurred, not when the "right to maintain such action shall have accrued."

For example, if after the damage which resulted from the July 25 seizure, the boats were released and then reimpounded and confiscated, we can assume under the decision in the instant case that limitations would not run from their original detention on July 25, but rather from the second impounding and confiscation, the theory being that the damages incurred at final confiscation exceeded the damages incurred on July 25. It is an elementary legal principle that if petitioners had in fact given erroneous legal advice the respondent would be entitled to

maintain an action against them immediately after the first seizure. This same principle applies to the damages respondent immediately suffered when he received and relied upon the allegedly erroneous advice. But the Court of Appeals in deciding the *only* question in this case—when limitations began to run—felt they need not consider "whether or not appellees' advice had previously caused other damage." It is incomprehensible that in deciding when a cause of action "accrued" a United States Court of Appeals would feel it unnecessary to consider when the plaintiff first suffered injury and could have first maintained his suit.

This interpretation of the District's statute of limitations will wreak havoc upon the administration of the District's laws. Each time a new pain results from an auto accident the statute now appears to start anew. For, the courts will simply not consider whether the accident "had previously caused other damage." To correct such situations the Supreme Court has, on numerous occasions, exercised its jurisdiction to review decisions interpreting and applying statutes limited in effect to the District where the interpretation is of great importance to the administration of the District's laws. *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953); *District of Columbia* v. *Pace*, 320 U. S. 698 (1944); *District of Columbia* v. *Murphy*, 314 U. S. 441 (1941); see also *Washington Fid. Ins. Co.* v. *Burton*, 287 U. S. 97 (1936).[2]

An action against an attorney for breach of duty in performing services, or for negligence, accrues at the time

[2] "The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and of sound administration of justice." Dissenting opinion of Mr. Justice Murphy in *Fisher* v. *United States*, 328 U.S. 463, 490 (1946).

the breach of duty takes place and not when the breach is discovered or actual damage results. In *Griffith* v. *Zavlaris*, 30 Cal. Rptr. 517 (1963) an attorney was charged with negligently failing to advise his client as to the applicability of a securities regulation which required the obtaining of a permit. The cause of action accrued, the court held, when the erroneous advice occurred and not on the date the alleged negligence was discovered. To the same effect is *Goldberg* v. *Bosworth*, 215 N.Y.S. 2d 849 (1961), holding that the statute of limitations began to run on the date the attorney's breach of duty occurred and not when the ultimate damage was sustained.

The above cases follow the controlling decision of this Court in *Wilcox* v. *Plummer*, *supra* (see point two *infra*), holding limitations run from the time the erroneous advice is given. As recently as 1963 in *Finegan* v. *Lumbermens Mutual Casualty Co.*, *supra*, the Court of Appeals for the District cited *Wilcox*, *supra*, in affirming the granting of summary judgment based on the statute of limitations as to a negligence count upon the accepted theory that the statute ran from the breach of duty.

The lower court's modification of that rule and the statute cannot be justified on the basis of Congressional ambiguity in drafting. There is nothing obscure or ambiguous in the Congressional direction contained in D. C. Code § 12-301 (1967 ed.) that "Except as otherwise *specifically* provided by law," actions for the following purposes "*may not be brought*" after the expiration of the period specified "*from the time the right to maintain the action accrues*" (Emphasis added). Note that Congress did not say that suit may be brought more than three years "after the most serious consequential damage has occurred," nor "from the time that the particular damage occurs for which relief is sought," which is the effect of the holding in the instant case that "suit was timely

whether or not appellees' advice had previously caused other damage."

The heretofore controlling law in the District on when a cause of action accrues, the recognition in the District of *Wilcox*, *supra*, the clear and unambiguous language of the District's statute of limitations, and the havoc which the lower court's interpretation will wreak upon the administration of the District's laws call for the exercise of this Court's jurisdiction so as to resolve this substantial question in a manner consistent with established judicial interpretations.

2. The decision of the Court of Appeals is in direct conflict with controlling decisions of this Court.

In 1830 this Court was confronted with the exact question presented below: "When does an action against an attorney for malpractice accrue?" Had the lower court carefully considered *Wilcox* v. *Plummer*, 29 U. S. 172, it is doubtful petitioners would now need ask this Court to take jurisdiction. In *Wilcox* a client sued his attorney for failing to name all the parties in an action on a note. In construing when the action accrued this Court said:

> "When the attorney was chargeable with negligence or unskillfulness his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action." At 182.

The fact that in *Wilcox* the suit was in assumpsit does not make the case's holding inapplicable in the instant tort situation. In *Amy* v. *Dubuque*, 98 U. S. 470 (1879) this Court was faced with the question of when limita-

tions commenced to run where the suit was in contract. The "cause accrue[d]", the Court said, "from the time the right to sue for a breach attaches." At 476. In other words no matter what the nature of the cause of action —assumpsit, negligence, or contract—limitations run from the time the aggrieved party could have first maintained an action—*first filed his suit.*

In deciding when a cause of action accrued in *Scoville* v. *Thayer*, 105 U. S. 143 (1882), this Court rephrased the question in a manner not unlike that here advanced by petitioners and as adopted by the District Court below:

> "In other words, when could they have commenced this action against this defendant to recover the amount due on his stock." At 153.

More recently in *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59 (1953), the question of when a "cause of action accrued" under the Portal-to-Portal Act was presented to the Court. There a District court had granted petitioner's motion for summary judgment on the ground that limitations had run. The Court of Appeals reversed holding that limitations did not begin to run from the time the petitioner violated the Act (here the Walsh-Healey Act) but rather from the time it was administratively determined that in fact a violation had taken place. In reversing the Court of Appeals this Court said:

> "We conclude that 'the cause of action accrued,' within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed * * * A cause of action is created when there is a breach of duty owed the plaintiff. It is the breach of duty, not its discovery, that normally is controlling." At 65.

The clear impact of these Supreme Court decisions (and the decisions heretofore controlling in the District of Columbia) is that the test of accrual is not when did

maximum damage occur but rather when did all the facts exist which would authorize a suit.

Under *Wilcox* and *Unexcelled* that date is May 16, 1962. Under the decision below, regardless of the fact that damages existed and a suit could have been brought on May 16, 1962, the three year statute is unexplainably extended to July 22, 1965.

CONCLUSION

In the face of controlling decisions of this Court and the District of Columbia Courts, the Court of Appeals in the instant case has arrived at the untenable position that a suit for legal malpractice may be maintained more than three years after the plaintiff was first entitled to file suit. The theory advanced by the lower court—that limitations run from the date of the particular damage complained of—presents a serious and substantial question which will result in significant problems in the orderly administration of the District's statute of limitations. Accordingly, the petitioners ask this Court to grant certiorari so as to interpret the Congressionally enacted word "accrues" in a manner consistent with this Court's previous decisions.

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